

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

**MCKENZIE-WILLAMETTE REGIONAL
MEDICAL CENTER ASSOCIATES, LLC,
d/b/a MCKENZIE-WILLAMETTE
MEDICAL CENTER**

and

Case 19-CA-119098

**SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 49, CTW-CLC**

Helena Fiorianti, Esq., for the General Counsel.

Bryan T. Carmody, Esq., for the Respondent.

Lynn-Marie Crider, Esq., for the Charging Party.

DECISION

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me on July 8, 2014, in Portland Oregon. The case involves an allegation that McKenzie-Willamette Regional Medical Center Associates, LLC d/b/a McKenzie-Willamette Medical Center (the Respondent) failed to provide the Service Employees International Union Local 49, CTW-CLC (the Union) certain information requested by the Union. The employer, for its part, did not contest the allegations at the hearing but instead relied on asserted general denials and affirmative defenses. Respondent's contention was that based upon its asserted denials and defenses, the complaint should be dismissed in its entirety. I find that Respondent violated the National Labor Relations Act (the Act) as alleged.

STATEMENT OF THE CASE

The complaint alleged that Respondent violated Section 8(a)(5) and (1) of the Act by delaying and failing to provide the Union certain relevant requested information. Respondent

filed a timely answer to the complaint denying all violations of the Act. Counsel for the General Counsel, and Respondent filed briefs in support of their positions on August 12, 2014.¹ On the entire record, I make the following

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FINDINGS OF FACT

I. Jurisdiction

10 The complaint alleges, Respondent admits, and I find that at all material times, Respondent has been a State of Delaware Limited Liability Company with its place of business in Springfield, Oregon, and has been operating a hospital providing in-patient and out-patient medical care.

15 The complaint further alleges, Respondent admits, and I find that at all material times Respondent, in conducting these operations, derived gross revenues in excess of \$250,000 and purchased and received at its corporate headquarters products, goods, and materials valued in excess of \$5000 directly from points located outside the State of Oregon.

20 The complaint alleges, Respondent admits, and I find that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and further, the Union, is, and has been a labor organization within the meaning of Section 2(5) of the Act.

25 Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. Labor Organization

30 The complaint alleges, Respondent admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the act.

III. The Alleged Unfair Labor Practices.

A. Background

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Respondent operates a hospital that provides both in-patient and out-patient care. The parties entered into a collective-bargaining agreement which was effective from May 2011

¹ After the trial a flurry of motions, responses, and replies were filed. Counsel for the General Counsel filed a Motion to Reopen the Record for Limited Purpose or in the Alternative to Take Administrative Notice, Respondent filed a response opposing the motion. Counsel for the General Counsel thereafter filed a reply to Respondent's opposition. Respondent filed a Motion to Strike Portion of General Counsel's Reply and Attachment to Reply. Counsel for the General Counsel then filed its opposition to Respondent's motion to strike and filed a cross motion to strike Exhs. A through C of Respondent's posthearing brief. Respondent filed an opposition to the General Counsel's Motion to Strike the posthearing brief exhibits which was followed by the General Counsel's reply to Respondent's Opposition to the General Counsel's motion to strike. The matters raised within the various motions are implicitly addressed within this decision. To the extent that it could be argued that they are not, after careful consideration each motion referenced above is denied except for that part of the General Counsel's motion to take administrative notice which as discussed more fully below is **GRANTED**.

through December 31, 2013. Since about November 4, 2013, the parties have been engaged in bargaining for a successor agreement. The parties have yet to come to any agreement regarding all of the terms of a successor agreement but have been engaged with a Federal mediator attempting to resolve outstanding issues.

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B. The Bargaining Unit

The Union has a decade long history of representation with Respondent. Broadly speaking this case involves Respondent's service, technical and skilled maintenance employees. The unit encompasses a large cross section of various job types and categories. The unit consists of the following employees:

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All full-time, part-time, on-call, and per diem employees employed by Respondent in the job classifications of Housekeeper, Dietary Worker, Housekeeper Team Leader, Materials Linen Tech Lead, Dietary Worker Lead, Clerical Assistant, Assistant Operating Room Schedule Coordinator, Physical Therapy Aide I, Medical Records Clerk I, Supply Distribution Aide I, Courier, Supply Distribution Aide II, Sterile Process Tech, Santa Clara/JC Utility Groundskeeper, Custodian, Dietary Clerk, Patient Service Assistant, Supply Distribution Aide Team Leader, Admissions Specialist, Certified Sterile Tech, Central Scheduler PRN, CNA, Utility Groundskeeper Lead, Custodian Team Leader, Dietary Clerk Lead, PSA Team Leader, X-Ray Technician-Ground, Lead Transcriptionist, Cashier I, Switchboard Operator, Trauma Registrar, Occupational Therapy Assistant, Operating Room Aide, Pharmacy Technician Trainee, X-Ray Assistant, Physical Therapy Aide II, Clerk Generalist, Storeroom Clerk, Security Officer, Linen Tech, Food Service Cook Purchase Produce Clerk, X-ray Technician Student, Relief Lead Admitting Clerk, Lead Switchboard Operator, Lead Security Officer, Lead Cook, Purchase Produce Clerk Lead, Nurse Aide, Endoscopy Support Aide I, Endoscopy Support Aide II, Cashier II, Admitting Clerk, Unit Services Coordinator, Respiratory Care Clerk/Assistant, X-Ray Receptionist/Secretary, Rehabilitation Secretary/ Receptionist, Central Supply Technician, Santa Clara/JO Rehabilitation Secretary/Receptionist, Team Leader Administrative Clerk, Accounts Receivable Clerk, Refund/Correspondence Clerk, Business Office Lead Clerk, Appointment Scheduling Coordinator, OB CNA Scrub Technician, Operating Room Schedule Coordinator, Surgical Support Aide, Lab Assistant, Clerk Specialist, Shipping/Receiving Clerk, Maintenance Worker I, Surgical Supply Aide Team Leader, Lead Lab Assistant, Clerk Specialist Team Leader, Respiratory Therapy Student Coder I, Emergency Medical Technician, Emergency Department Technician/Clerk, X-Ray Transcriptionist, Holter Analyst, Data Entry - Operating Room, Endoscopy Technician, Histology Assistant, Release Information Specialist, Bio-med Technician I, Relief Charge Respiratory Therapist, Charge Respiratory Therapist, Respiratory Therapist, Pharmacy Technician, Medical Lab Technician, Certified Pharmacy Technician, Electrocardiogram/OCT Tech, Electroencephalogram/Electrocardiogram Technician, Coder II, Certified Pharmacy Technician Specialist, Electroencephalogram/ Electrocardiogram Technician Lead, Certified Respiratory Therapist, Polysomnographic Technician, Relief Charge Respiratory Therapist Certified, Charge Polysomnographic Technician, Charge Respiratory Therapist Certified, Respiratory Therapist PFT Certified, Respiratory Therapist Respiratory Therapist Technician, Physical Therapy Assistant, Certified Occupational Therapy Assistant, Registered Respiratory Therapist, Emergency Department Paramedic, Engineering I, Engineering II. Health Information Specialist, Health Information Management Technician, Insurance Verifier, Lead Diagnostic Imaging Receptionist, Nutrition Services I, Obstetrics Technician, Operating Room Materials Aide, Pharmacy Clerk, Physical Therapy Secretary, Radiology Technologist, Registered, Certified Surgical Tech, Maintenance Worker II, Medical Records Coder III Coder III Team Leader, Medical Receptionist Input Coder Lead, ABG Maintenance Technician, Respiratory Therapist PFT Registered, Angio Tech, X-Ray Technician, X-ray Technician 2, Relief Charge Respiratory Therapist Registered, Maintenance Specialist, Charge RI

Registered, Charge Cardiovascular Technician Spr Technician, Echo cardiology Technician, Clinical Engineer, Bio-med Relief Lead Pay, Charge Medical Technologist, Medical Technologist, Lab Section Coordinator, Unit Secretary, Industrial Injury Specialist, Electrocardiogram Technician, Charge Section Coordinator, Charge
 5 Electroencephalogram/Electrocardiogram Technician, Pharmacy Secretary, CAT Scan Technologist, Special Procedures Technician, Ultrasound Technologist, X-ray Technologist, Charge Radiology Tech, Charge Registered Polysomnographic Technician, Registered Polysomnographic Technician PRN, Radiology Technologist, Transporter, Unit Services
 10 Coordinator Lead, Quality Assurance Auditor, Patient Financial Services Representative II, Workers Compensation Specialist, Reimbursement Analyst, Financial Services Specialist, Pre-Service Representative, Patient Financial Services Representative Lead, Relief Charge Medical Technician, Lead Monitor Tech, Relief Charge Medical Lab Technician, Intensive Care Unit Monitor Technician, Relief Charge Radiology Technician, Relief Charge CAT Scan Technician and Charge CAT Scan Technician; excluding all other employees, professional employees,
 15 guards and supervisors as defined in the Act.

C. Negotiations

Overview

20 During all times material to this case, the parties were engaged in contract negotiations which formally began on November 4, 2013. At the time of negotiations, the Union proposed wage increases of at first 3.3 percent, and then reduced its proposal to 3 percent. Respondent proposed an increase of 1.2 percent and then 1.5 percent. Respondent also proposed changes to the health plan care but the Union has not submitted any counterproposal asserting that it lacks
 25 sufficient information to allow it to analyze the proposal.

D. Bargaining Teams

30 The Union's bargaining team consisted of the Union's health care director, the Union's lead negotiator, as well as employee bargaining team members. Although not present at the first bargaining session, Lynn-Marie Crider, the union bargaining coordinator who had particular expertise in health insurance plans and health policy was working behind the scenes on information requests. Respondent's negotiation team members were Megan O'Leary, vice president of human resources, and two attorneys, Don Carmody and Steven Ward.
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IV. The Information Violation

A. The Information Requests at Issue in this Case

40 The allegations in this case rest on information requests that were sent by the Union to Respondent on October 17, 2013.² These information requests were drafted by Lynn-Marie Crider and sent directly to Megan O'Leary.

Ms. Crider requested the following information:

² It is important to note that at trial, counsel for the General Counsel withdrew the allegations of unreasonable delay set forth in par. 6c of the complaint relating to requested item 6(a) xiii and also the allegation relating to item 6(a) xiv referenced in complaint par. 6d. (Tr. 57:1-6.)

1. for all employees currently working and to be covered by this Collective Bargaining Agreement:

- 5 a) Name
- b) Date of hire
- c) Sex
- d) Job classification
- e) Current base hourly rate of pay
- 10 f) Number of regularly scheduled hours per week
- g) Total gross wages earned in calendar year 2012
- h) Total gross wages earned in year-to-date 2013
- i) Health insurance in which the employee is currently enrolled, including the benefit plans selected, and the coverage selected (i.e., employee only, employee and
- 15 spouse, etc.)
- j) The subsidy for health care currently being paid (monthly amount and pay period amount).
- 20 2. The total payroll for SEIU Local 49 bargaining unit employees in calendar year 2012 and, separately, for calendar year-to-date 2013, including specific dollar amounts for each of the following cost areas:
- k) Regular wages
- l) Overtime premium (i.e., the additional amount over and above the regular rate)
- 25 m) Holiday premium d. Vacation pay
- n) Sick pay
- o) Other paid leave
- p) Shift premium pay h. Other premium pay
- 30 3. Current job descriptions for all SEIU 49 represented classifications.
4. Copies of all MWMC's policies and procedures that apply to the members of our bargaining unit.
- 35 5. A copy of the OSHA 300 logs for each of the last three calendar years.
6. The cost to the Employer of a 1% wage increase for all employees for the bargaining unit
- 40 7. The number of current vacancies by job classification.

Concerning Health and Welfare Plans

- 45 8. A copy of the current summary plan description for each health, vision, and dental benefit plan offered to members of the SEIU Local 49 bargaining unit.

9. The total cost for medical, for vision, and for dental (separately) and the cost per caregiver per year for SEIU bargaining unit employees in each of the 2010, 2011 and 2012 plan years by plan and coverage level (e.g., caregiver only, caregiver & adult, caregiver & children, caregiver, adult & children).
10. The total cost and cost per caregiver per year as in question 7, broken down by amounts paid by the employee and by the employer.
11. An Excel sheet with health plan enrollment information for each SEIU Local 49 bargaining unit member for plan years 2010, 2011 and 2012, to include plan name, level of coverage, out of pocket health care expenditures, broken out by type of expenditure (e.g., deductible, co-pay, co-insurance, etc.) and amount of premium share for each individual employee and who is being covered (e.g. spouse or domestic partner, children, etc.).
12. All Custom Group Experience Reporting or other experience reporting (annual and quarterly) supplied by any benefit consultant, the plan administrator, or any other entity during the current and prior three plan years, showing the key utilization and cost indicators summary; group demographic summary; monitor reporting; top 20 (or more) diagnoses, procedures, prescriptions, therapeutic classes with codes, numbers of claimants, and total cost. Explain whether costs in the plan are attributable to all plan participants or to bargaining unit employees and their dependents only.
13. If MWMC plans to propose any health plan changes:
- a) Documents describing the details of the plans MWMC proposes to offer and the costs to employees, including any differences in services covered among the plans currently offered and the plans MWMC proposes to offer;
 - b) The projected total cost per employee per year (including any portion proposed to be borne by the employee) in the next plan year of continuing with the same plans currently offered to bargaining unit employees and of adopting the plans the employer proposes to offer;
 - c) The projected total employee cost per year for premiums for deductibles, for co-pays, and for coinsurance in the next plan year if the employer continues with the same plans currently offered to bargaining unit employees and if the employer adopts the plans the employer proposes to offer; and
 - d) The actuarial value of each of the plans currently offered and the plans MWMC proposes to offer.

Concerning Retirement Plans

14. A copy of the current summary plan description for each retirement plan offered to members of the SEIU Local 49 bargaining unit.

5 15. Complete copies of each annual report-the plan's Form 5500 filings with all attachments and schedules-for plan years 2010 to present;

Other Benefit Plans

10 16. Please provide a summary plan description of any and all other benefit plans made available to members of our bargaining unit. This may include disability benefits, flexible spending accounts, etc. For each such benefit, please include both employee and employer share of cost on a monthly basis. [GC Exh. 3.]

15 The Union requested that Respondent provide the information by November 1, 2013, so that it could have the information prior to the first bargaining session. Respondent did not provide any of the requested information prior to the first bargaining session. Instead, on the first day of bargaining, November 4, 2013, O'Leary provided Ward with documents responsive to requests numbers 8, 14, and 16. By email dated November 6, 2013, Crider acknowledged receipt of the information that was provided but informed O'Leary that the majority of information had not been provided. (GC Exh. 4.) O'Leary responded, "I will have additional portions of these ready to give to you by the end of the week. As you may remember from years past, some of the things you ask, we do not track, or have a way to provide in the manner in which you are asking for them. However, I am working on what I can, and will have the next batch off by Friday. Unfortunately, your time frame is simply prohibitive considering the limited resources I have to produce the information and the labor intensive manner in which it has to be done." (GC Exh. 4.) Friday came and went and "the next batch" of documents that were promised did not arrive. (GC Exhs. 4, 7.)

30 On November 26, 2013, O'Leary notified the Union that Respondent planned to make changes to the unit employees' healthcare benefits. The notice provided as follows:

35 This letter will serve as the 30 day notification to the SEIU of the following changes to the McKenzie Willamette Medical and Dental plans allowed for in our current Collective Bargaining agreements. Effective 01/01/2014 there will be a 9% increase in employee premiums for these employees covered by our "Premium" Plan (at the highest level of coverage, Employee Plus Family, this equates to less than an \$18 per pay period increase) and a 4% increase in the employee premiums for those employees enrolled in Our "Choice" Plan and in the Dental Plan. In addition, attached you will find minor plan changes as well [GC Exh. 5].

45 In response to the notice, the Union requested to bargain over the proposed changes and by email dated December 2, 2013, Crider advised O'Leary that she hadn't yet received any of the requested information and further advised that given the proposed changes she would need the information that was previously requested but was made contingent on whether Respondent intended to make changes to the health plans. (GC Exhs. 3, 7-8) [see requests # 13(b)-013(d)].

O'Leary assured Crider that she was "working on forwarding more information" but the information was not provided. (GC Exhs. 3, 8.)

At the second bargaining session on December 11, 2013, Ward advised Respondent that the Union wouldn't be able to bargain over the health care issues because Respondent hadn't provided information that was requested. O'Leary assured Ward that they were working on gathering information. Respondent at the bargaining session provided the union with some of the requested information which included:

- 1) the name, date of hire, sex, job classification, current base hourly rate of pay, number of regularly scheduled hours per week, total gross wages earned in calendar years 2012 and 2013, and the subsidy for health care currently being paid for all bargaining Unit employees. [GC Exh. 3 [item #s 1(a) -1(h) and # 1(j)].]
- 2) a copy of the OSHA 300 logs (i.e., logs reporting accidents that Respondent submits to the Occupational Safety and Health Administration) for each of the last three calendar years. [GC Exh. 3 [item #5]]; and
- 3) the cost to Respondent of a 1% wage increase for all employees in the bargaining Unit. [GC Exh. 3 [item # 6].]

On December 16, 2013, O'Leary emailed Crider information regarding the total cost per bargaining unit employee of health insurance. (GC Exh. 9.) O'Leary also sent health plan enrollment information for the years 2010-2012, but did not provide the Union with information regarding the out of pocket health care expenditures or the amount of premium share for each individual employee. (GC Exh. 3.) On January 15, 2014, O'Leary sent an email to Crider which contained information relating to the unit employees wages and their paid time off. (GC Exhs. 3 and 10.) O'Leary also provided a "thumb drive" with information regarding job classifications and procedures but the drive did not contain job vacancy information that had been requested. (GC Exhs. 3, 10.)

B. The Duty to Provide Information

Section 8(a) (5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a) (5). As the Board explained in *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2 (2011): An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956) [parallel citations omitted]. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). By contrast, information concerning nonunit employees is not presumptively relevant; rather, relevance must be shown. *Shoppers*

Food Warehouse Corp., 315 NLRB 257, 259 (1994). The burden to show relevance, however, is “not exceptionally heavy,” *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983); “[t]he Board uses a broad, discovery-type standard in determining relevance in information requests.” *Shoppers Food Warehouse*, *supra* at 259.

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C. Relevance

1. The relevant information requests

The Respondent, in its answer, specifically denied the allegations contained in the complaint which asserted that the information sought by the Union was both necessary and relevant to the Union in the performance of its duties as the exclusive collective-bargaining representative of the unit. Prior to trial, on July 3, 2014, counsel for the General Counsel filed a motion to strike the portion of Respondent’s answer relating to relevance. Counsel for the General Counsel argued *inter alia* that, “each of the items listed in Complaint Paragraph 6(a) pertains to Unit employees’ terms and conditions of employment. Respondent, at no time since the Union submitted its information request, ever questioned or contested the relevance of the information requested. Moreover, Respondent never contested the relevancy of the information requested by the Union during the investigation of the underlying charge in this case.” (See GC Motion at p. 2.) Respondent did not file a responsive pleading to the General Counsel’s motion, and the motion to strike was granted and the denial set forth in Respondent’s answer was deemed admitted.³

Assuming for the sake of argument that the portion of Respondent’s answer relating to relevance had not been stricken, the evidence of record establishes, and I find that the information requested by the Union all related to terms and conditions of unit employees and the information sought was presumptively relevant. See for example, *Postal Service*, 332 NLRB 635 (2000); *Oaktree Capital Management*, 353 NLRB 1242 (2009); *Otay River Constructors*, 351 NLRB 1105 (2007), and also *Hanson Aggregates BMC, Inc.*, 353 NLRB 287 (2008). Therefore, Respondent had an obligation to provide the information sought in a timely manner. See *Woodland Clinic*, 331 NLRB 735 (2000), and *Pennco, Inc.*, 212 NLRB 677, 678 (1974).

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2. The failure to provide relevant information.

The Union was entitled to all of the relevant information referenced above and I find that Respondent’s refusal and/or failure to provide the information violated the Act. “The refusal of

³ Respondent took the position that since the actions of the Regional Director in issuing the complaint was void *ab initio* it was under no obligation to file a responsive pleading. Respondent took the same position regarding the subpoena that was served upon it arguing that it was under no obligation to respond to the subpoena. Counsel for the General Counsel argued that Respondent’s failure to respond to the subpoena warranted the imposition of sanctions. Given my findings discussed more fully below, I concur with counsel for the General Counsel that Respondent was under an obligation to comply with the subpoena. Nevertheless, in view of my conclusion that Respondent violated the Act as alleged, imposing additional sanctions would serve no useful purpose.

an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the act without regard to the employer's subjective good or bad faith." *Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191 (2012), *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979). The failure to provide the information is in direct contravention to the fundamental objectives of the Act. "The objective of the disclosure [of requested information] obligation is to enable the parties to perform their statutory function responsibly and 'to promote an intelligent resolution of issues at an early stage and without industrial strife.'" *Clemson Bros.*, 290 NLRB 944, 944 fn. 5 (1988).

3. The delay in providing information

The obligation to provide relevant information includes within it an obligation to provide the information in a timely manner. *Shaw Supermarkets*, 339 NLRB 871 (2003). In this case it is undisputed that Respondent eventually provided some of the requested information. However, it cannot also be said that it made any reasonably diligent effort to do so. Nearly 8 weeks passed before it handed over some of the most basic information which it had at its ready disposal. Indeed, it took Respondent more than 3 months to provide simple job descriptions. I find that this unexplained and unreasonable "foot dragging" violated both the letter the spirit of the Act. *Quality Engineered Products*, 267 NLRB 593 (1983).

D. Respondent's Defenses

Respondent's defenses were predicated upon its position that the underlying complaint was void ab initio because: (1) the Regional Director was appointed when the Board lacked a quorum; and (2) the Regional Director's transfer to Region 19 was void because it occurred at a time when the Board lacked a quorum.

1. The Regional Director's appointment

Respondent's initial defense was premised on the requirement under the NLRA that the Board must have at least three members to constitute a quorum. 29 U.S.C. § 153(b). Applicable Supreme Court precedent further instructs that this quorum requirement must be satisfied "at all times." *New Process Steel v. NLRB*, 560 U.S. 674, 688 (2010). Respondent's argument also had at its foundation Section 3(d) of the NLRA which requires that "[t]he appointment, transfer, demotion or discharge of any Regional Director . . . shall be made by the General Counsel only upon approval of the board." 67 Fed.Reg. 62992-01 (October 1, 2002). Respondent argues that since Regional Director Hooks was appointed on January 6, 2012, his appointment is invalid because at that point in time the board lacked a valid quorum in light of the Supreme Court's decision in *Noel Canning v. NLRB*, 134 S.Ct. 2550 (2014), which held that a 3-day recess was too short a timeframe to trigger the President's power under the Recess Appointments Clause and therefore the January 4, 2012 recess appointments of Members Sharon Block, Richard Griffin, and Terrence Flynn were invalid.

Respondent drew its conclusion regarding the appointment of Ronald Hooks directly from information provided by the NLRB. The NLRB "announced the appointment" of Regional Director Hooks on January 6, 2012. (R. Exh. 4.) Similarly, Respondent noted that in other

litigation the NLRB took the position that in fact Regional Director Hooks was appointed January 6, 2012. More specifically, in an appellate brief filed by the General Counsel in *NLRB v. Kitsap Tennant Support Services*, the General Counsel in a footnote stated, “In April 2000, a five member Board appointed Mr. Hooks Director for Region 26 after he served as Regional attorney in that office. In January 2012, he was appointed Director for Region 19 and transferred to that office.” (R. Exh. 5 p. 23 fn. 9.)

After the close of the hearing, counsel for the General Counsel moved to reopen the record or in the alternative to take administrative notice and sought to introduce the actual certificate of appointment of Ronald Hooks which showed the actual date he was appointed to be December 23, 2011. Respondent moved to strike the appointment certificate and also argued that the Government should be precluded from arguing that the date of his appointment was anything other than January 6, 2012, as had already been set forth by the Agency in its press release and its representations in the *Kitsap* case referenced above. I take administrative notice of the fact that the actual and correct date of Hook’s appointment is December 22, 2011, as noted in the appointment certificate attached to counsel for the General Counsel’s motion. See *Metro Demolition Co.*, 348 NLRB 272 (2006).

2. Estoppel against the Government

The equitable doctrine of estoppel is typically invoked to avoid injustice and requires that the party claiming estoppel must have relied upon the representations in such a manner as to change their position for the worse. 3 J. Pomeroy, *Equity Jurisprudence* Section 805, p. 192 (S. Symons ed. 1941). Estoppel against the government requires an even higher standard. In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-61, (1984), the Supreme court noted that, “when the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant. . . . Estoppel against the government is appropriate only in the rarest of circumstances when the “countervailing interests of citizens in some minimum standard of decency, honor, and reliability in their dealings with the government” outweighs the public interest in ensuring that the government can enforce the law.” *Id.*

It is clear (and counsel for the General Counsel admits) that there were inaccuracies in the *Kitsap* brief. Similarly, the wording of the news release which “announced” the appointment of Regional Director Hooks, might have left the impression that Regional Director Hooks was in fact appointed on January 6, 2012. However, Respondent made no showing that would suggest that in reliance upon the inaccuracies in the *Kitsap* brief (or the press announcement) it changed its position for the worse. Respondent also made no showing that standards of “decency, honor, and reliability” outweigh the interests of the public in having the NLRA enforced.⁴ While Respondent established that the *Kitsap* brief contained an error, I find that Respondent presented

⁴ The General Counsel on July 31, 2014, filed a Motion to Correct a factual misstatement in the NLRB’s reply brief in the *Kitsap* case in an attempt to correct the record regarding the date of Hook’s appointment.

no legally supportable justification for striking the affidavit of appointment and/or in the alternative precluding the General Counsel from relying upon it.

3. Regional Director Hook's appointment and transfer was valid

Respondent's argument might in fact carry the day if indeed Regional Director Hooks was actually appointed on January 6, 2012, but he wasn't. In fact he was appointed and transferred when (pursuant to the three-member rule noted above) a valid quorum existed. Chairman Pearce, Members Hayes and Becker were all participants in the decision. (See Board's Minute Order Dated December 22, 2011.)

The status of Member Becker at the time deserves some mention as some have challenged the validity of his recess appointment. In *Teamsters Local 455 v. NLRB*, 2014 WL 4214920 (10th Cir. 2014), the court applying the reasoning and rationale set forth by the Supreme Court in *Noel Canning*, supra, found that since Member Becker was appointed during an intra-session recess exceeding 2 weeks his appointment was valid and the Board's power and authority to act was intact. A similar result based on identical reasoning was reached in *Gestamp S. Carolina, L.L.C. v. NLRB*, 11-2362, 2014 WL 5013049 (4th Cir. 2014).

Assuming for the sake of argument Respondent's assertions had some validity they would in any event have been rendered moot by the Board's subsequent actions. The Board by Minute Order dated July 18, 2014, in response to the Supreme Court's decision in *Noel Canning*, affirmatively "confirmed, adopted and ratified *nunc pro tunc* all administrative, personnel and procurement matters approved by the Board or taken by or on behalf of the Board from January 4, 2012 to August 5, 2013." (See Board Minute Order of July 18, 2014.)

Conclusions of Law

1. The Respondent, McKenzie-Willamette Regional Medical Center Associates, LLC, d/b/a McKenzie-Willamette Medical Center, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Service Employees International Union Local 49, CTW-CLC (the Union), is a labor organization with the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the designated exclusive collective-bargaining representative of the following bargaining unit of Respondent's employees:

All full-time, part-time, on-call, and per diem employees employed by Respondent in the job classifications of Housekeeper, Dietary Worker, Housekeeper Team Leader,

Materials Linen Tech Lead, Dietary Worker Lead, Clerical Assistant, Assistant
 Operating Room Schedule Coordinator, Physical Therapy Aide I, Medical Records
 Clerk I, Supply Distribution Aide I, Courier, Supply Distribution Aide II, Sterile
 Process Tech, Santa Clara/JC Utility Groundskeeper, Custodian, Dietary Clerk,
 5 Patient Service Assistant, Supply Distribution Aide Team Leader, Admissions
 Specialist, Certified Sterile Tech, Central Scheduler PRN, CNA, Utility
 Groundskeeper Lead, 'Custodian Team Leader, Dietary Clerk Lead, PSA Team
 Leader, X-Ray Technician-Ground, Lead Transcriptionist, Cashier I, Switchboard
 Operator, Trauma Registrar, Occupational Therapy Assistant, Operating Room Aide,
 10 Pharmacy Technician Trainee, X-Ray Assistant, Physical Therapy Aide II, Clerk
 Generalist, Storeroom Clerk, Security Officer, Linen Tech, Food Service Cook
 Purchase Produce Clerk, X-ray Technician Student, Relief Lead Admitting Clerk,
 Lead Switchboard Operator, Lead Security Officer, Lead Cook, Purchase Produce
 Clerk Lead, Nurse Aide, Endoscopy Support Aide I, Endoscopy Support Aide II,
 15 Cashier II, Admitting Clerk, Unit Services Coordinator, Respiratory Care
 Clerk/Assistant, X-Ray Receptionist/Secretary, Rehabilitation Secretary/
 Receptionist, Central Supply Technician, Santa Clara/JO Rehabilitation
 Secretary/Receptionist, Team Leader Administrative Clerk, Accounts Receivable
 Clerk, Refund/Correspondence Clerk, Business Office Lead Clerk, Appointment
 20 Scheduling Coordinator, OB CNA Scrub Technician, Operating Room Schedule
 Coordinator, Surgical Support Aide, Lab Assistant, Clerk Specialist,
 Shipping/Receiving Clerk, Maintenance Worker I, Surgical Supply Aide Team
 Leader, Lead Lab Assistant, Clerk Specialist Team Leader, Respiratory Therapy
 Student Coder I, Emergency Medical Technician, Emergency Department
 25 Technician/Clerk, X-Ray Transcriptionist, Holter Analyst, Data Entry - Operating
 Room, Endoscopy Technician, Histology Assistant, Release Information Specialist,
 Bio-med Technician I, Relief Charge Respiratory Therapist, Charge Respiratory
 Therapist, Respiratory Therapist, Pharmacy Technician, Medical Lab Technician,
 Certified Pharmacy Technician, Electrocardiogram/OCT Tech,
 30 Electroencephalogram/Electrocardiogram Technician, Coder II, Certified Pharmacy
 Technician Specialist, Electroencephalogram/ Electrocardiogram Technician Lead,
 Certified Respiratory Therapist, Polysomnographic Technician, Relief Charge
 Respiratory Therapist Certified, Charge Polysomnographic Technician, Charge
 Respiratory Therapist Certified, Respiratory Therapist PFT Certified, Respiratory
 35 Therapist Respiratory Therapist Technician, Physical Therapy Assistant, Certified
 Occupational Therapy Assistant, Registered Respiratory Therapist, Emergency
 Department Paramedic, Engineering I, Engineering II. Health Information Specialist,
 Health Information Management Technician, Insurance Verifier, Lead Diagnostic
 Imaging Receptionist, Nutrition Services 1, Obstetrics Technician, Operating Room
 40 Materials Aide, Pharmacy Clerk, Physical Therapy Secretary, Radiology
 Technologist, Registered, Certified Surgical Tech, Maintenance Worker II, Medical
 Records Coder III Coder III Team Leader, Medical Receptionist Input Coder Lead,
 ABG Maintenance Technician, Respiratory Therapist PFT Registered, Angio Tech,
 X-Ray Technician, XRay Technician 2, Relief Charge Respiratory Therapist
 45 Registered, Maintenance Specialist, Charge RI Registered, Charge Cardiovascular
 Technician Spr Technician, Echo cardiology Technician, Clinical Engineer, Bio-med
 Relief Lead Pay, Charge Medical Technologist, Medical Technologist, Lab Section
 Coordinator, Unit Secretary, Industrial Injury Specialist, Electrocardiogram

Technician, Charge Section Coordinator, Charge Electroencephalogram/Electrocardiogram Technician, Pharmacy Secretary, CAT Scan Technologist, Special Procedures Technician, Ultrasound Technologist, X-ray Technologist, Charge Radiology Tech, Charge Registered Polysomnographic Technician, Registered Polysomnographic Technician PRN, Radiology Technologist, Transporter, Unit Services Coordinator Lead, Quality Assurance Auditor, Patient Financial Services Representative II, Workers Compensation Specialist, Reimbursement Analyst, Financial Services Specialist, Pre-Service Representative, Patient Financial Services Representative Lead, Relief Charge Medical Technician, Lead Monitor Tech, Relief Charge Medical Lab Technician, Intensive Care Unit Monitor Technician, Relief Charge Radiology Technician, Relief Charge CAT Scan Technician and Charge CAT Scan Technician; excluding all other employees, professional employees, guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably delaying and/or failing and refusing to provide information requested by the Union and relevant to the Union's representational duties.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall provide the Union with the information requested in paragraphs 1(i), 2, 7, 9, 10, 11, 12, 13b-d, and 15 of the October 17, 2013 information request. To remedy Respondent's unlawful failure to bargain in good faith with the Union, Respondent shall be ordered to bargain in good faith with the Union.⁵

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The Respondent, McKenzie-Willamette Regional Medical Center Associates, LLC, d/b/a McKenzie-Willamette Medical Center, Springfield, Oregon, its officers, agents, successors, and assigns, shall

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing and refusing to bargain with the Union as the representative of its employees in an appropriate bargaining unit by unreasonably delaying and/or failing and refusing to provide information requested by the Service Employees International Union, Local 49, CWT-CLC that is relevant and necessary to the Union's representational status.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In a timely manner, furnish the Union with all the information requested by the Union in its information request of October 17, 2013. More specifically, Respondent shall provide information fully responsive to paragraphs 1(i), 2, 7, 9, 10, 11, 12, 13b-d, and 15 of the October 17, 2013 request.

(b) Within 14 days after service by the Region, post at its facility in Springfield, Oregon, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

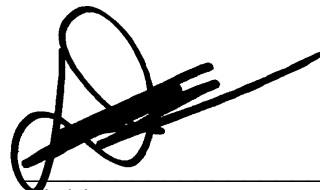
⁷ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C. November 4, 2014

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Dickie Montemayor
Administrative Law Judge

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APPENDIX

**Notice To Employees
Mailed by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post, mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;
Choose a representative to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail to collectively bargain in good faith with Service Employees International Union, Local 49, CTW-CLC (the Union), by delaying, refusing, and/or failing to provide the Union with requested information that is relevant and necessary to the performance of the Union's duties as exclusive collective bargaining representative of nonprofessional unit employees at our facilities in Springfield, Oregon.

WE WILL provide the Union with the information it requested in its October 17, 2013 information request.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

MCKENZIE-WILLAMETTE REGIONAL
MEDICAL CENTER ASSOCIATES, LLC, d/b/a
MCKENZIE-WILLAMETTE MEDICAL CENTER

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-119098 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.